No. 93-141

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

WEST LYNN CREAMERY, INC., and LECOMTE'S DAIRY, INC.,

Petitioners,

against

JONATHAN HEALY, Commissioner of Massachusetts Department of Food and Agriculture,

Respondent.

WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

Petition for Certiorari Filed July 15, 1993

Certiorari Granted October 4, 1993

BRIEF OF CUMBERLAND FARMS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S POSITION URGING REVERSAL

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Brief for *Amicus Curiae* Cumberland Farms, Inc.

Amicus curiae Cumberland Farms, Inc. (hereinafter sometimes "Cumberland" or "CFI") submits the following

brief, pursuant to *Supreme Court Rule 37.2* (the written consent of the parties is being filed contemporaneously), in support of the position being advanced by petitioners *West Lynn Creamery, Inc.* and *LeComte's Dairy, Inc.*

Amicus Curiae's Interest in the Outcome of These Proceedings

Amicus is a fluid milk dealer, licensed by respondent Commissioner to operate as such in the Commonwealth of Massachusetts. It operates a large, federally-regulated fluid milk plant in Canton, Massachusetts, a suburb of Boston, from which plant it distributes fluid milk products throughout New England. Most (about 80%) of the raw milk processed in that plant is produced on out-of-state dairy farms. In that respect, *amicus's* interest in this proceeding precisely parallels that of petitioners (App. 12a).* In addition, Cumberland operates a federally-regulated fluid milk plant in East Greenbush, New York, from which it distributes fluid milk products to New York State and to Western Massachusetts, primarily through its own dairy convenience stores. The New York processing plant is supplied by New York and Vermont dairy farmers. ***None*** of the raw milk processed in that plant is produced on Massachusetts dairy farms.[1]

*App. in quotes refers to appendix attached to this brief.

[1]CFI's Massachusetts plant is regulated by the "New England Federal Milk Marketing Order #1" (the "New England Federal Order"), which includes virtually all of Massachusetts, all of Rhode Island and Connecticut, and portions of Vermont and New Hampshire (*7 C.F.R., Section 1001.2*). Its New York plant is regulated by the "New York-New Jersey Federal Milk Marketing Order #2" (the "New York-New Jersey Federal Order"), which includes most of Eastern and Central New York and all of Northern and Central New Jersey (Footnote continued on next page.)

CFI's federally-regulated New York processing plant thus affords the ultimate example of the adverse protectionist and burdensome effect of the Massachusetts regulation upon interstate commerce, to wit: very substantial payments are exacted from *amicus* by respondent Commissioner (under pain of imminent license revocation) to be distributed solely to Massachusetts dairy farmers, notwithstanding that not one drop of milk processed at that plant is produced on Massachusetts farms.

Similarly, although Cumberland's Canton, Massachusetts plant acquires ***none*** of its producer milk from Maine dairy farmers, that plant regularly supplies fluid milk products to CFI's 20-odd dairy convenience stores in Maine. Because the State of Maine also has enacted a state Class I "premium" scheme which, in every respect material to the Commerce Clause issue, is indistinguishable from the Massachusetts Pricing Order, *amicus* has an additional pecuniary interest in the outcome of these proceedings.

Indeed, *amicus* is a party plaintiff in two pending federal cases which present the same facial Commerce Clause challenge to these recently-enacted state-imposed milk "premiums": (a) a proceeding which parallels the case at bar, *Cumberland Farms v. Watson*, No. 92-12785 (WF), pending in the District Court for the District of Massachusetts;[2] and (b) an appeal to the First Circuit Court of Appeals from the lower court's judgment which had sustained Maine's regula-

(Footnote continued.)
(*7 C.F.R., Section 1002.2*). Thus, with respect to both plant operations, Cumberland's payment obligations for the raw milk it purchases, and the minimum prices received by producers supplying those milk processing plants, are determined by the provisions of said Federal Orders #1 and #2, respectively. (App. 5a).

[2]Cumberland's complaint (App. 1a-21a) was filed on November 12, 1992. Its summary judgment motion was filed in July 1993, and is pending unheard as this *amicus* brief is being prepared.

tion, on cross-motion for summary judgment. *Cumberland Farms, Inc. v. LaFaver, et al.*, No. 93-2066.[3]

The Recently-Enacted (1990's) State Class I "Premiums" and Federal Court Challenges Thereto

Maine and Massachusetts are two of the four states which have enacted state-imposed federal milk "premiums" within the last two years. The others are New York (in 1991) and Minnesota (in 1992 and 1993). All these schemes contain each of the following features: (a) a state-mandated "premium" minimum price for packaged fluid milk sales (Class "I" sales) within the state, which are substantially higher than the relevant federal order price; (2) application of that same rate of impost upon milk produced on out-of-state dairy farms, for the purpose and with the necessary effect of removing any incentive for fluid milk processors ("handlers") to obtain out-of-state milk supplies; and (3) distribution of the monies thus exacted from handlers of in-state and out-of-state milk alike to in-state dairy farmers only.

All four enactments have been challenged in the federal courts, and upon essentially the same grounds—that although the state regulations purport to apply even-handedly to in-state and out-of-state milk, the very application of the local assessment to out-of-state milk represents economic protectionism and therefore is proscribed by the Commerce Clause, as a matter of law. The New York and Minnesota regulations already have been held to be facially invalid as applied to out-of-state milk, on the basis of *Baldwin v.*

[3]The federal district court's opinion in that case was rendered on August 3, 1993 (App. 22a-32a). Cumberland's brief as appellant was filed in the First Circuit on or about November 4, 1993.

G.A.F. Seelig, Inc., 294 U.S. 511 (1935) and other controlling precedents. *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992), *Marigold Foods, Inc. et al. v. Redalen*, 809 F. Supp. 714 (D. Minn. 1992) (Marigold I) and *Marigold Foods, et al. v. Redalen* (D. Minn. decided October 20, 1993) (Marigold II).

SUMMARY OF ARGUMENT

Amicus contends that the Massachusetts and Maine regulatory schemes should suffer the same fate and for essentially the same reasons—that they also facially offend very well-established Commerce Clause principles, in at least two respects. First, by requiring *amicus* (and others similarly situated) to pay the same state-imposed Class I "premium" with respect to out-of-state milk as that imposed upon locally-produced milk, the regulations in effect exact a prohibited "customs duty" equal to the price differential between the state-enhanced price and lower-priced (but federally-regulated) out-of-state milk. The controlling precedents are *Baldwin v. G.A.F. Seelig, Inc., supra*, and its progeny. Secondly, by distributing the proceeds of that exaction to in-state dairy farmers only, the regulations reserve to local producers the entire benefit of this state-augmented Class I price, thereby clearly offending the principles laid down in *Polar Ice Cream v. Andrews*, 375 U.S. 361 (1964).

Having been afforded the opportunity to review the draft of petitioners' brief on the merits, and being familiar with the arguments to be advanced on behalf of *amicus* Milk

Industry Foundation ("MIF"),[4] in accordance with *Rule 37.1* our brief will attempt to bring relevant matter to this Court's attention which we have reason to believe will not be dealt with at length by petitioners or by the other *amicus*. Thus, our Argument will be confined to the following Points: (a) the impact of *Polar Ice Cream v. Andrews, supra*, upon resolution of the Commerce Clause issue; and (b) a description of the Congressional and Executive Branch actions with respect to the dairy price support program and federal milk order pricing during the last decade, and the extent to which these recently-enacted state "premiums" conflict with the objectives sought to be attained thereby.

ARGUMENT

POINT I

THE MASSACHUSETTS PRICING ORDER, WHICH REQUIRES ALL MILK DEALERS TO PAY A STATE-IMPOSED CLASS I "PREMIUM" ON ALL FLUID MILK SOLD WITHIN THE STATE, INCLUDING MILK PRODUCED ON OUT-OF-STATE DAIRY FARMS, AND WHICH PROVIDES THAT THE MONIES THUS EXACTED ARE TO BE PAID OVER TO IN-STATE PRODUCERS ONLY, REPRESENTS AN IMPERMISSIBLE TRADE BARRIER AND FACIALLY VIOLATES THE COMMERCE CLAUSE, WITHIN THE MEANING OF *POLAR ICE CREAM V. ANDREWS*

Preliminarily, we believe that the following description of the economic background to and the operation of the

[4]MIF is the nationwide milk dealers' trade association. We have been informed that the attorneys who will be filing its *amicus curiae* brief also represented the successful plaintiffs in *Marigold I* and *Marigold II*.

federal milk marketing order program will assist the Court in focusing upon the issues discussed herein. (These matters have been described in considerable detail in some of this Court's prior decisions).[5]

The two distinctive and essential economic phenomena peculiar to the milk industry which gave rise to governmental price regulation in the wake of the Great Depression of the 1930's are: (a) a basic two-price structure that permits a higher return for the same product depending upon its ultimate use; and (b) the cyclical characteristic of raw milk production which results in the maintenance throughout the marketing season of substantial raw milk production in excess of fluid demand. See *Zuber v. Allen*, 396 U.S. 168, 172 (1969).

Federal milk marketing orders maintain uniform prices to handlers for milk utilized in the same use class and, at the same time, eliminate any incentive for dairy farmers to engage in destructive internecine competition for the higher-priced fluid milk market by "marketwide pooling," to wit: Milk packaged for consumption in fluid form ("Class I" milk) commands the highest price in the marketplace. All dairy farmers supplying handlers in a federally-regulated market share proportionately in the benefit of that higher-priced Class I use, and conversely, share proportionately in the burden of carrying the market's surplus (or

[5]*See e.g., Zuber v. Allen*, 396 U.S. 168, 177-178 (1969); *Lehigh Valley Cooperative v. United States*, 370 U.S. 76, 78-81 (1962) and *Polar Ice Cream v. Andrews, supra* (375 U.S. at 367, Note 4).

Class III) milk[6], because all producers supplying the market are paid the same "blend" price which, subject to certain differentials not here relevant, reflects the marketwide weighted average "use" values of raw milk purchased by all the handlers regulated by the Order. But all handlers pay for their raw milk in accordance with their own "use value." This is accomplished by the "producer settlement fund," administered by the federal milk market administrator, pursuant to which each handler, in addition to paying the "blend" price directly to farmers, either makes a monthly payment into, or draws a payment from, that fund depending upon whether its particular "use value" is more than or less than the marketwide average.

Thus, federally-regulated handlers such as *amicus, i.e.*, those businesses which primarily are involved in the processing and packaging of raw milk for consumption in fluid form, make *two* separate payments for their raw milk: (i) they pay directly to their dairy farmers at least the monthly "blend" price as determined by the federal milk marketing administrator; and (ii) they make a separate payment into the "producer settlement fund" of the difference between their own "use value" and the marketwide average of all handlers' use values. Thus, it is the act of disposing of (selling) the finished product as Class I milk (rather than the purchase of the raw milk itself) which solely triggers, and determines the amount of, the second of the two payment obligations.

[6]Class III milk is used to manufacture "hard" dairy products such as butter, powdered milk and hard cheeses. Under the orders, there also is a Class II category, which includes most "soft" products, such as cottage cheese, sour cream, yogurt, etc. For purposes of this case, however, Class II and Class III milk shall be referred to together as "surplus" milk.

All four of the recently-enacted state Class I "premiums," including the Maine and Massachusetts regulations, would exact from handlers a third monthly payment, solely as a consequence of in-state sales of fluid milk and irrespective of the state of origin of the producer milk—a payment which is the functional equivalent of a "customs duty" equal to the difference between the augmented State minimum price and the federal order Class I price.[7] And, because the revenues generated by those state-imposed premiums are funnelled (by state regulatory officials) solely to in-state producers, these state-mandated "premiums": (1) are utterly inconsistent with the very purpose of marketwide pooling under the federal orders—an equitable sharing of benefits and burdens of fluid and surplus milk utilization among ***all*** producers supplying the market; and (2) more to the present point, are utterly inconsistent with the teaching of *Polar Ice Cream v. Andrews, supra.*

In that case, this Court invalidated Florida's attempt to reserve the benefits of the lucrative Pensacola area Class I market to its local producers, before permitting any out-of-state milk to be utilized for Class I purposes. Justice White, speaking for an unanimous Court, held that that case was controlled by *Baldwin* and its progeny, stating (375 U.S. at 375, 377):

> "The principles of *Baldwin* are as sound today as they were when announced. They justify, indeed require, invalidation as a burden on interstate commerce of that part of the Florida regulatory scheme

[7]Although *amicus* contends that in so doing, these state enactments clearly violate the principles of *Baldwin v. Seelig*, in that respect we shall rely upon the arguments presented in the briefs to be submitted on behalf of petitioners and on behalf of *amicus* MIF.

which reserves to its local producers a substantial share of the Florida [Class I] milk market." (375)

* * *

"The exclusion of foreign milk from a major portion of the Florida market cannot be justified as an economic measure to protect the welfare of Florida dairy farmers or as a health measure designed to insure the existence of a wholesome supply of milk. This much *Baldwin* and *Dean* made clear . . . Florida has no power 'to prohibit the introduction within her territory of milk of wholesome quality acquired [in another State], whether at high prices or at low ones,' 294 US 521, 79 L ed 1037; the State may not, in the sole interest of promoting the economic welfare of its dairy farmers, *insulate the Florida milk industry from competition from other States*." (emphasis added). (377).

The Massachusetts regulation, in addition to eliminating any economic incentive for handlers to increase their purchase of out-of-state raw milk to fulfill their Class I needs, also mandates that the entire benefit of the state Class I "premium" will be distributed solely to in-state dairy farmers, even if 100% of the Class I milk sold in the Commonwealth were to be produced on out-of-state farms!! Putting it in other words, the Commissioner's Pricing Order adds a *Polar Ice Cream* Commerce Clause insult to the *Baldwin v. Seelig* injury. In either event, it should not have passed Constitutional muster in that State's court of last resort.

Obviously, the Commerce Clause denies to Massachusetts the power to thus appropriate unto its residents alone revenues which rightfully should have belonged, if at all, to out-of-state producers. As stated in *Polar Ice Cream, supra* (375 U.S. at 379):

> "The power which we deny to Florida is reserved to Congress under the Commerce Clause, and we are offered nothing indicating either congressional consent to, or acquiescence in, a regulatory scheme such as Florida has employed. On the contrary, under the present Act authorizing federal marketing orders in the milk industry, such an order may not 'prohibit or in any manner limit, in the case of the products of milk, the marketing . . . of any milk or product thereof produced in any production area in the United States.' This provision, as the Court explained in Lehigh Valley Coop. v. United States, 370 US 76 . . . was intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States. *We seriously doubt that Congress, in denying the power to the Secretary, thereby granted it to the States.*" (emphasis added).

In *Polar*, Justice White also referred to the then "recurring question of the validity of a State's attempt to regulate the supply and distribution of milk and milk products." 375 U.S. at 362. In the nearly thirty years which have elapsed since *Polar Ice Cream* was decided, we are not aware (until recently) of any state that has attempted to protect its local dairy farmers from the competitive effects of out-of-state commerce in milk. (Except for the "reciprocity" statutes and even those relatively innocuous measures were struck

down as violative of the Commerce Clause in *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976)). Meanwhile, the federal milk order program has enjoyed phenomenal success and acceptance by the milk industry, to the point that by the 1980's the overwhelming majority (about 80%) of milk marketed as Class I milk in the United States was processed and sold by federally-regulated handlers.

It has only been within the last two years that three State Legislatures (New York, Maine and Minnesota) and one State regulatory official (Massachusetts) have attempted to bolster the income of their local dairy farmers by mandating state-imposed Class I "premiums." As stated above, all four state regulatory schemes include: (1) the establishment (by legislative or administrative fiat) of a state-mandated "target" Class I price with respect to all in-state sales of packaged fluid milk; (2) the exaction (by State officials) of a mandatory assessment upon wholesalers (processors or distributors) of fluid milk within the State, equal to the approximate difference between the "target" price and some lower-priced (but federally established) reference point; (3) application of that uniformly-imposed monetary charge to milk produced on both in-state and out-of-state dairy farms; and (4) distribution of the monies thus exacted pro rata to in-state dairy farmers only, to the complete exclusion of the out-of-state farmers which produced the raw milk involved.

And, as we also have seen: (a) federal district court judges in New York and Minnesota already have held those two state "premiums" to facially offend the Commerce Clause; and (b) *amicus* CFI's federal court challenges to the Massachusetts and Maine "premiums" are pending in the District Court and the First Circuit Court of Appeals, respectively. In that regard, we respectfully refer this Court to

the striking similarities between: the *ratio decidendi* of the SJC in this case and the federal district court's opinion in *Cumberland Farms v. LaFaver* (App. 22a-32a).

Amicus recognizes that the validity *vel non* of the Maine enactment is not presently *sub judice* here. (Nor do we presently know if the State of Maine intends to participate as an *amicus* in this proceeding). Accordingly, we conclude this portion of our presentation by merely noting that although densely-populated Massachusetts is a decided "import" state whereas Maine is an "export" state, resolution of the Commerce Clause issue cannot depend upon whether a particular state is "deficit" or "surplus" insofar as milk production vs. consumption is concerned. Otherwise, blatant economic protectionism would be prohibited in densely-populated states and sanctioned in thinly-populated states—an absurd result. In that regard, we also note that: (a) Minnesota's per capita raw milk production probably is among the highest, if not ***the*** highest in the Country; and (b) New York also is an "export" state now and probably also was in the 1930's when *Baldwin v. Seelig* was decided. Accordingly, the fact that Maine also is an "export" state should in no way serve to insulate its enactment from its Commerce Clause infirmities.

POINT II

ALL FOUR OF THE RECENTLY-ENACTED STATE-IMPOSED CLASS I "PREMIUMS" (INCLUDING THE MASSACHUSETTS PRICING ORDER) ARE INCONSISTENT WITH: (A) THE OBJECTIVES SOUGHT TO BE ATTAINED BY CONGRESS IN THE 1985 FARM BILL; AND (B) THE SECRETARY OF AGRICULTURE'S VERY RECENT (1991) REJECTION OF PROPOSALS TO INCREASE CLASS I MILK PRICES THROUGHOUT THE FEDERAL MILK MARKETING ORDER SYSTEM, INCLUDING THE NORTHEAST

[We recognize that consideration of the matters discussed herein is not, strictly speaking, necessary to a proper resolution of the Commerce Clause issue. After all, *Baldwin v. Seelig* was decided long before any of the federal programs discussed herein were in place, and while the Country's dairy farmers were still suffering the throes of the Great Depression of the 1930's. Nonetheless, we believe that it is important to emphasize that: (a) to a considerable extent, these recently-enacted state "premiums" run counter to recent federal policies dealing with the same subject matter (the appropriate level of minimum milk prices and its effect upon the total quantity of milk produced on our Nation's dairy farms); and (b) dairy farmers in the Northeast are far from an "embattled" species].[8]

[8]Quoting from the opinion in *Cumberland Farms v. LaFaver (App. 22a).*

A. The Interrelation of the Federal Milk Order and Dairy Price Support Programs[9]

The minimum Class I milk prices established by the Secretary throughout the federal order system are comprised essentially of two component parts: (a) the value, at any given time, of producer milk used to manufacture surplus dairy products, such as butter, non-fat powdered milk and hard cheese (the "basic formula" price); and (b) a specific "Class I" differential (the particular market's "distance" differential). The former is derived from the "Minnesota-Wisconsin Price Series" (M-W), a monthly statistical sampling made by the USDA of actual prices paid to dairy farmers in those two states by plants processing Grade B (manufacturing grade) milk, for use in the manufacture of butter, cheese and non-fat powdered milk. Because those manufactured "dry" dairy products can be transported over long distances at a relatively small cost, the value of Grade A milk when used to produce such products, and ergo the surplus (or Class III) price that handlers pay for such milk, is essentially the same as the M-W price throughout the entire federal order system.

Moreover, for many decades the federal government (or more accurately, federal taxpayers) has been supporting that "basic formula" price by means of a separately-enacted Congressional program—the dairy price support program—pursuant to which the Government, through the Commodity

[9]The matters referred to herein are described in considerably greater detail in the House Report accompanying H.R. 2100, the bill which ultimately became the "Food Security Act of 1985." P.L. 99-198, 99 Stat. 1372. *H. Rpt.* 99-271, Part 1, 99th Cong., 1st Sess., pp. 1 to 25 (1985), relevant portions of which appear at App. 36a *et seq.*

Credit Corporation ("CCC"), agrees to purchase all the butter, non-fat dry milk and American cheese on the market at pre-announced "floor" prices. See generally, the *Agricultural Act of 1949*, as amended, the relevant portions of which are now contained in *7 U.S.C., Section 1446, et seq.*

On the other hand, the Class I or "distance" differentials are regional in scope. They vary from each other generally in direct proportion to the distance from the Center of the Upper Midwest (Eau Claire, Wisconsin, to be precise) to the population center of the particular federal order. That inter-market alignment is designed (at least in part) to discourage uneconomic movements of bulk producer milk among the orders, and thus reflects (again, at least in part) the cost of transporting fluid milk from the Upper Midwest to the particular federal market order involved.[10]

The "basic formula" or M-W price is by far the larger of the two components of the minimum Class I pricing, even in the Northeast. To illustrate, between 1985 and 1990, the annual average "M-W" price (which fluctuates seasonally) has ranged between $11.30 and $12.37/cwt, whereas the Class I "differential" established for the New England

[10]Uneconomic intra-market movement of fluid milk is discouraged by means of "location" differentials within a particular federal order. For instance, within Federal Order #1, Class I prices are "zoned," depending upon the location of the plant to which the producer milk is delivered. Milk delivered to metropolitan Boston ("City") plants commands the highest price, and the Class I prices decrease in proportion to the plant's distance therefrom and at rates which generally reflect the cost of transporting fluid milk (whether in bulk or consumer-type packages). That cost now is and for some time has been recognized to be about $.34/cwt per 100 miles. See *e.g., H. Rpt.* p. 24 at App. 44a. And, the Class I price at the 201-210 mile or "21st Zone" is $.72/cwt less than the nearest Boston "City" Zone Class I price of $3.24/cwt.

Federal Order at the Boston ["city"] zone) has remained at $3.24/cwt.

B. The Federal "Food Security Act" of 1985 and the 1990 "Nationwide" Federal Milk Marketing Order Hearings

The federal milk marketing order program has enjoyed phenomenal success, and widespread acceptance in the industry (both producer and processor organizations) in accomplishing its twin goals of market stability ("orderly marketing") and reasonable returns for our Nation's milk producers. Indeed, by the late 1980's (if not earlier), 80% of Grade A (fluid grade) milk produced in the United States was regulated by federal milk marketing orders. *H. Rpt., supra* note 8, p. 22 (App. 43a). On the other hand, during the 1980's, the dairy price support program was generally believed to have engendered over-production (at a tremendous cost to the taxpayers) because the support levels were too high.[11]

The Congressional response was contained in the 1985 Food Security Act, *P.L. 99-198, 99 Stat. 1372 et seq.*, two features of which were: (a) the "dairy termination" or "whole herd buyout" program, under which dairy farmers throughout the Country were provided very significant cash incentives if they were to agree to cease dairying for five years (and dispose of their herds for purposes other than for milk production); and (b) restructuring of the price support program so as to provide for automatic reductions in support prices whenever CCC purchases reached certain levels. See

[11]For a more detailed description of the foregoing matters, including the cause and effect relationship between the price support program and over-production of milk throughout the Country during the 1970s and 1980s, see *H. Rpt. 19-22 (App. 39a-42a).*

7 U.S.C., Section 1446 (d)(1)(2) and *(3)*. Both programs obviously were designed to reduce the absolute number of dairy farmers in the Country and thus the nationwide milk supply and to reduce the budgetary outlays for the dairy price support program. See *H. Rpt.* at 14 and 19; App. 38a and 39a.

At the same time, Congress evidenced its continued support of the federal milk order program by, among other things, mandating increases in the Class I differentials throughout most of the entire federal order system, thus recognizing that the size of those "distance-related" prices (which had not been changed for decades) had not kept pace with increases in transportation costs. Those "distance" differentials were incorporated into the Act itself. See *7 U.S.C., Section 608c(5)* (*H. Rpt.* 22-24; App. 43-44).[12]

Some producer interest groups apparently were not pleased with the foregoing, especially in Wisconsin and Minnesota (which two states produced virtually all of the Grade B milk, and a majority of the Grade A milk used for manufacturing purposes in the federal order system). Ultimately, in 1990, those groups successfully petitioned the United States Secretary of Agriculture to hold an unprecedented (and extremely extensive) series of "nationwide" federal milk marketing order hearings. The outcome of those proceedings are not relevant to this case save in one respect—the Secretary refused to accept all proposals, including the one advanced by Agri-Mark—by far the largest and politically most active producer cooperative in New England—to increase Class I differentials above the price levels mandated by the 1985 Act.[13]

[12]As the House Report recognized, p. 24 (App. 44a), by 1985 it was costing about 3.4 cents/cwt per 10 miles to move milk, whereas the then existing Class I differentials had remained at about 1.5 cents/cwt, despite "dramatic increases in transportation costs in the interim." As noted earlier, the 1985 Congressionally-mandated Class I differential applicable to the Boston Zone under Order #1, was (and still is) $3.24/cwt.

C. Milk Price Fluctuations During 1989-1991

Having thus been unsuccessful in persuading the Federal Government (both the Legislative and Executive branches) to enact the kind of price-enhancement measures they sought, some producer groups aimed their lobbying efforts at state governments. They may have been aided somewhat in their lobbying efforts by the fact that although milk was in rather tight supply and milk prices were thus at record high levels during 1989-1990, milk prices declined rather dramatically during the Fall of 1990. But these fluctuations in nationwide milk prices: (a) were brought about by the combined effects of the 1985 federal policies described above, together with the adverse effects of rather unusual weather in several regional milksheds; and (b) were relatively brief in duration—by the Spring of 1991, the M-W price had returned to 1988-1989 levels).[14]

[13]The extent and all-encompassing scope of those hearings (U.S.D.A. Docket Nos. AO-14-A64, etc.) is readily apparent from the Secretary's Recommended and Final Decisions as printed in 56 Fed. Reg. 58972 (11/22/91) and 58 Fed. Reg. 12634 (3/5/93) respectively. Agri-Mark's proposal (A-17) is described at 56 Fed. Reg. 58975-6 and 58 Fed. Reg. 12638-9. The Secretary's determination— "that the present Class I differential should remain in place"—can be found at 56 Fed. Reg. 58984 and 58 Fed. Reg. 12646.

[14]The data referred to herein are based upon the "Milk Market Statistics" as published annually by the New England Order #1 market

(Footnote continued on next page.)

Although these producer price fluctuations occurred throughout the Nation, dairy farmers were successful in their lobbying efforts in but four states. It is ironic that Maine and Massachusetts should have been two of those states, because dairy farmers there already were enjoying milk prices that were among the highest in the Country, due in part to relatively high Class I prices and Class I utilization of producer milk in New England, and the existence throughout most of the market of substantial negotiated "over-order" Class I premiums.

To summarize all of the foregoing, although dairy farmers throughout the United States enjoyed some "ups" and suffered some "downs" due to milk price fluctuations between mid-1989 and mid-1991, (during the course of which they had enjoyed some record high milk prices): (a) neither Congress nor the Secretary took any actions to increase milk prices anywhere; and (b) to the extent these state-imposed Class I "premiums" encourage local dairy farmers to in-

(Footnote continued.)
Administrator, some of which data are summarized at App. 33a to 35a. More particularly, during 1989: (a) the M-W price fluctuated from a low of $10.98/cwt in March to a high of $14.93 in December—a price which was roughly $2.50/cwt higher than its highest point since 1985; and (b) the M-W price *averaged* $12.37 during the year, which was the highest *annual* average since 1984. Moreover, the most dramatic increases occurred between August and December 1989, when the M-W price jumped from $12.37 to $14.93. Relatively high milk prices continued throughout most of 1990, until October of that year when the M-W price dropped to $10.48. However, by August 1991, supply/demand equilibrium returned, and the M-W price rose to $11.50 that month and reached about $12.50 during October/November 1991. That was about where it had been throughout the several years preceding the 1985 Food Security Act. And, in 1992 the M-W price averaged $11.88/cwt—substantially higher than *all* annual averages 1985-1988! (App. 34a).

crease milk production, they run counter to the objectives sought to be attained by the federal Congressional and Executive actions referred to above.

CONCLUSION

For all the foregoing reasons, *amicus* Cumberland Farms, Inc. supports petitioners in urging this Court to reverse the determination below and hold that the Massachusetts Pricing Order is unenforceable against petitioners, and against all milk dealers operating in the Commonwealth of Massachusetts.

Respectfully submitted,

CUMBERLAND FARMS, INC.

By their Attorneys,

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Dated: November 15, 1993

APPENDIX TO BRIEF OF *AMICUS CURIAE*
CUMBERLAND FARMS, INC.

Complaint in Cumberland Farms, Inc., D-I-P v. Watson, United States District Court.

Filed: U.S. District Court, District of Massachusetts, Clerk's Office, November 20, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CUMBERLAND FARMS, INC.,
Debtor-in-Possession,

Plaintiff,

against

GREGORY WATSON, Individually and as COMMISSIONER,
Massachusetts Department of Food and Agriculture,

Defendant.

Civil Action No. 92-12785 WF COMPLAINT

Plaintiff, Cumberland Farms, Inc., Debtor-In-Possession in Chapter 11 bankruptcy proceedings pending before the United States Bankruptcy Court for the District of Massachusetts (Case No. 92-41305), complaining of defendant, says:

JURISDICTION AND VENUE

1. This action is filed to obtain, among other things:

(a) a declaratory judgment that the 1992 "Pricing Order" issued by defendant as Commissioner of the Massachusetts Department of Food and Agriculture (hereinafter "Commissioner") facially and as applied to plaintiff (i) violates the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3); (ii) deprives plaintiff of rights guaranteed pursuant to 42 U.S.C., Sec. 1983; (iii) is inconsistent with and therefore pre-empted by paramount Federal law, including Sec. 602 of the Agricultural Marketing Agreements Act of 1937 (7 U.S.C., Sec. 602) and therefore unenforceable pursuant to the Supremacy Clause of the United States Constitution (Art. V); and (iv) deprives plaintiff of due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution;

(b) appropriate preliminary and permanent injunctive relief enjoining defendant from enforcing said Pricing Order against plaintiff either directly or indirectly (i.e., by seeking to impose any administrative or judicial sanction against plaintiff arising out of plaintiff's noncompliance therewith);

(c) damages, including a refund of all monies heretofore paid by plaintiff pursuant to said Pricing Order, together with interest thereon;

(d) reasonable attorney's fees, as provided for, ***inter alia***, by 42 U.S.C., Sec. 1988; and

(e) such other relief as may be appropriate.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C., Sections 1331, 1343(3), 2201 and 2202; and 42 U.S.C., Sec. 1983; and the doctrine of pendent jurisdiction.

3. Venue is proper in this District because plaintiff's claims arose here.

PARTIES

4. Plaintiff is a milk dealer licensed by defendant Commissioner to sell milk in the Commonwealth of Massachusetts. Plaintiff operates fluid milk processing plants both within the Commonwealth (at Canton, Massachusetts) and in the State of New York (at East Greenbush). The milk processed in those two plants is distributed both within the Commonwealth and throughout all of New England and the State of New York. The raw milk which plaintiff processes in said plants is produced on dairy farms throughout New England and in New York State. (As more particularly appears below, very few of those dairy farms are located in Massachusetts). Throughout its entire operation, from raw milk procurement to and including distribution of the finished product, plaintiff is engaged in interstate commerce.

5. Defendant Gregory Watson ("Commissioner") is the Commissioner of the Massachusetts Department of Food and Agriculture, the state administrative agency which *inter alia*, is charged with the regulation of the milk industry in Massachusetts under the provisions of Chapter 94A. Said defendant, acting in his official capacity, promulgated the 1992 Pricing Order which is the subject of this Complaint.

BACKGROUND—THE INTERSTATE NATURE OF COMMERCE IN, AND ECONOMIC FEDERAL REGULATION OF, FLUID MILK IN THE NORTHEAST, INCLUDING THE NEW ENGLAND STATES

6. The dairy industry in the Northeastern United States, including New England, is characterized by substantial interstate movement of fluid milk, both from the dairy farm to the processing/bottling plant, and from the plant to the ultimate consumer. Accordingly, throughout most of the Northeast, the minimum prices which fluid milk processors ("handlers") must pay to dairy farmers ("producers") or associations of dairy farmers ("cooperatives"), are established by "regional" Federal milk marketing orders, promulgated by the United States Secretary of Agriculture ("Secretary") pursuant to the Agricultural Marketing Agreements Act of 1937 ("AMAA"), 7 U.S.C., Sec. 601, *et seq.*, as amended.

7. Currently, and for many years prior thereto, the Secretary has issued and enforced but three such regional federal milk marketing orders in the Northeast: the "New England Federal Milk Marketing Order #1" (hereinafter "Order #1" or the "New England" federal order), which includes virtually all of Massachusetts, all of Rhode Island and Connecticut, and portions of Vermont and New Hampshire (7 C.F.R., Section 1001.2); the "New York-New Jersey Federal Milk Marketing Order #2" ("Order #2" or the "New York-New Jersey Federal Order"), which includes most of eastern and central New York and northern New Jersey (7 C.F.R., Section 1002.2); and the "Middle Atlantic Federal Milk Marketing Order #4," which includes much of eastern Pennsylvania, southern New Jersey, Maryland, Delaware and portions of northern Virginia (7 C.F.R., Section 1004.2).

8. Plaintiff's Canton, Massachusetts plant is a "handler" regulated by said New England Federal Milk Marketing Order #1; and plaintiff's New York plant is a regulated "handler" pursuant to the New York-New Jersey Federal Milk Marketing Order #2. Accordingly, plaintiff's payment obligations to producers or cooperatives, and the minimum prices received by producers or cooperatives supplying said milk processing plants, are determined by the provisions of said Federal Orders #1 and #2, respectively.

9. Said pattern of regional federal minimum producer price regulation reflects the essentially interstate nature of commerce in the fluid milk industry throughout the entire Northeast, including New England. For instance, of the six New England states, only the two most sparsely populated—Vermont and Maine are "export" states: *i.e.*, dairy farmers within those two states produce far more milk than is consumed therein. This excess milk production is exported across state lines and sold to handlers who bottle milk for consumers in the more densely populated New England states. Moreover, a substantial portion of the milk sold to consumers in New England is produced on dairy farms located in the State of New York. A similar pattern of interstate commerce characterizes the fluid milk industry in Federal Milk Marketing Orders, Nos. 2 and 4. For instance, densely-populated New Jersey obtains most of its milk from New York and Pennsylvania, and a considerable quantity of producer milk is shipped from Pennsylvania to New York. And, the basic economic terms of that vast interstate commerce in fluid milk, including the prices paid by fluid milk handlers (buyers) and the prices received by dairy farmers (sellers) are determined and enforced pursuant to the provisions of the vast regional federal milk marketing orders referred to above.

10. As to the "export-import" situation in New England, according to the statistics published by the New England federal order Market Administrator, during the year 1991, about 72% of the producer milk received by handlers regulated under Federal Order #1 was produced on farms located in Vermont and New York, and a mere 7.8% was produced on Massachusetts dairy farms. Because the Commonwealth of Massachusetts contains about 40% of the population within the geographical coverage of the Federal Order, the Commonwealth is a decidedly import state—nearly 80% of the milk sold in Massachusetts is produced on dairy farms located within other states (primarily Vermont and New York).

11. For present purposes, the mechanics of the Northeastern federal milk marketing order may be summarized as follows: milk packaged for fluid consumption ("Class I" milk) commands the highest price in the marketplace; under the "marketwide pooling" provisions of federal orders, all dairy farmers supplying handlers in a federally-regulated market share proportionately in the benefit of the higher-priced Class I use, and conversely share proportionately the burden of carrying the market's surplus or lower-class uses. This is accomplished by mechanisms known as "marketwide pooling" and the "producer settlement fund," whereby handlers pay for raw milk in accordance with their own "use value," and all producers supplying the market are paid the same "uniform" or "blend" price which, subject to certain differentials not here relevant, reflects the marketwide weighted average "use" value of the milk purchased by all the handlers regulated by the Order.

12. In enacting the AMAA, Congress decidedly did not empower the Secretary to promulgate any provision pur-

suant to which the prices paid by handlers or received by dairy farmers are determined by the state in which the raw milk was produced, or the state within which the packaged milk is sold. Nor does any provision of a federal milk marketing order contain any "premium" price for farms located in a particular State, let alone at the "expense" of dairy farmers located outside of the "favored" jurisdiction. The several states can not validly "protect" the economic interest of their local dairy farmers to the detriment of buyers of out-of-state milk, even in the absence of federal milk marketing orders, because of well-settled Commerce Clause limitations, to which we now turn.

BACKGROUND—WELL-SETTLED COMMERCE CLAUSE LIMITATIONS ON STATE POWER TO IMPOSE ECONOMIC OR PRICE REGULATIONS ON OUT-OF-STATE MILK

13. The AMAA was adopted in 1937 in the aftermath of the Great Depression. But it took several years after 1937 until the validity of the Act and federal milk marketing orders promulgated thereunder were sustained by the United States Supreme Court, and federal milk marketing orders became prevalent in the Northeast.

14. Meanwhile, beginning in 1933, several states in the Northeast, led by New York, attempted to remedy the perceived problem of inadequate returns to their local dairy farmers by means of state law. This was accomplished primarily through the enactment of State milk control laws. To the extent that those state enactments impinged upon interstate commerce (*e.g.*, by attempting to insulate in-state farmers or dealers from competition with lower-priced out-of-state milk), such regulations uniformly were invalidated

on Commerce Clause grounds, beginning with the seminal case of *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 79 L. ed. 1032 (1935).

15. Depression-born State milk "controls" thus led to the establishment of a basic and fundamental principle of Commerce Clause law which is still sound today, to wit, that in attempting to protect the economic interests (profits) of its own citizens, a State may not require out-of-state producers, or others engaged in interstate commerce, to "surrender whatever competitive advantages they may possess" in order to do business within the State (quoting from *Brown Forman Distillers v. New York Liquor Authority*, 476 U.S. 573, 580, 90 L. ed. 2d, 552, 560 {1986}).

16. Notwithstanding the foregoing well-settled Commerce Clause limitations, and notwithstanding the prevalence, *and effectiveness*, of federal milk marketing orders in the Northeast, within the last two years state agencies in two very populous Northeastern states have responded to local dairy farmer interests (pressure groups) by enacting programs which designedly: (a) provide for augmented (higher than federal order minimum) prices or returns for their local dairy farmers; and (b) insulate buyers of locally-produced milk from interstate competition by imposing upon handlers of non-locally produced milk an "assessment" or "compensatory payment" which in effect acts as a tariff or customs duty on the in-state sale of the finished product. The proceeds of that assessment or payment are in turn distributed only to in-state milk producers. Thus, local producers receive for their raw milk both the federally-mandated minimum price (paid directly by the handler-buyer) and, in addition, the state-imposed "premium" (paid by the state agency from monies exacted from *all* milk distributors,

including those distributors who purchased little [or no] locally-produced milk).

17. Those two Northeastern states which recently have adopted such "protectionist" schemes for the benefit of their local dairy farmers are New York and Massachusetts. New York's "program" was adopted in early 1991, and the Massachusetts "Pricing Order" challenged herein was promulgated by defendant Commissioner in February 1992. The two programs, although differing somewhat in their respective mechanics, are identical insofar as their economic "protectionist" intent and effect to wit: (a) they superimpose upon the underlying federal order a "premium" price for their local dairy farmers; and (b) exact from sellers of non-locally produced milk a "compensatory" payment, the entire proceeds of which are distributed only to in-state dairy farmers.

18. New York State's attempt to thus augment the returns (profits) of its dairy farmers immediately was challenged as violative of the Commerce Clause. And, in an opinion rendered on April 14, 1992 (after the promulgation of the Pricing Order challenged herein), the United States District Court for the Southern District of New York granted summary judgment in favor of the plaintiffs and against the defendant New York Commissioner of Agriculture and Markets on the grounds that insofar as his milk pricing order attempted to impose a "compensatory payment" on milk sold within New York State but produced on out-of-state farms (the proceeds of which were to be distributed to New York State dairy farmers), said pricing order was *per se* prohibited by the Commerce Clause. *Farmland Dairies and Lehigh Valley Dairy, Inc. et al. v. McGuire*, (Dkt. #91 Civ. 3642, Hon. Robert P. Patterson, Jr.).

THE COMMISSIONER'S 1992 PRICING ORDER

19. On January 28, 1992, the defendant Commissioner, purporting to be acting under Section 12 of M.G.L., Chapter 94A, the Massachusetts Milk Control Act, declared a state of emergency to exist in the Massachusetts dairy industry on the basis of which on February 18, 1992 the Commissioner issued a "Pricing Order" (amended on February 26, 1992) under Sections 10, 11 and 12 of said Chapter 94A. (A copy of the Declaration of Emergency and the "Pricing Order" as amended are attached hereto as Exhibits "A" and "B").

20. The economic protectionist intent (motive) of the Pricing Order is evident from its Preamble which states that: (a) the purpose of the Order is to set a "target minimum price to be paid by milk dealers to *Massachusetts* producers above the federally-established minimum milk price"; and (b) the Order's "terms and conditions" (described below) "take into consideration the *regional nature* of the flow of milk . . .." Those "terms and conditions" take the "regional nature" of the flow of milk "into "consideration" in a patently impermissible manner, to wit:

(a) the "Pricing Order" imposes a monthly "assessment" upon all licensed milk dealers doing business in Massachusetts (whether located in or out of the Commonwealth) based upon the difference between a state-mandated "target price" and the actual minimum "blend price" fixed by the New England Federal Milk Market Administrator, with respect to all Class 1 milk *sales* in Massachusetts (irrespective of whether the milk dealer purchased its raw milk from Massachusetts or from out-of-state producers); and

(b) provides that the amounts thus assessed are to be paid into the "Massachusetts Dairy Equalization Fund" (hereinafter "Fund") which monies are to be distributed monthly by defendant Commissioner pro rata to Massachusetts dairy farmers ***only***.

21. The challenged Pricing Order represents economic protectionism both in intent and effect and thus directly burdens interstate commerce because it clearly and unequivocally:

(a) establishes a "premium" price for packaged milk sold in Massachusetts (regardless of where the raw milk was produced or processed), which is substantially in excess of the minimum prices established by the United States Secretary of Agriculture;

(b) protects that "premium" price from competition with lower-priced, federally-regulated out-of-state milk by imposing an "assessment" on the plaintiff and others similarly situated, which in actuality is a "customs duty" or "protective tariff" on the importation of producer milk from other states; and

(c) distributes the entire proceeds of that customs duty or tariff only to Massachusetts dairy farmers.

PLAINTIFF'S INJURY IN GENERAL

22. Plaintiff repeats the allegations of paragraphs 1 through 21 of the Complaint as fully set forth herein.

23. The challenged Pricing Order, as amended, requires all licensed milk dealers to file a monthly report and, at the same time, make the payment into the Fund on or before the 25th day of each month, based upon the previous month's Class I milk sales in Massachusetts. Said Pricing Order also requires that the monies thus paid into the Fund shall be distributed by the Commissioner to Massachusetts milk producers not later than the fifth day of the following month.

24. Pursuant to the express terms of the Pricing Order the total annual assessment against plaintiff will amount to approximately $1,000,000 ($234,361 during the last three months), all of which has been or will be distributed only to Massachusetts dairy farmers, despite the fact that nearly 80% of the raw milk purchased by plaintiff is produced by out-of-state dairy farmers.

25. The exaction of the aforesaid payments from plaintiff with respect to out-of-state milk sold in Massachusetts palpably violates plaintiff's rights, privileges and immunities pursuant to the Commerce Clause (and other federal constitutional and statutory provisions referred to hereinafter). Defendant therefore should be enjoined from attempting to exact said "assessment" from plaintiff and from distributing any of said funds to Massachusetts dairy farmers, most of which have no business relationship whatsoever with plaintiff.

26. In that regard, upon information and belief, there are some 400-odd Massachusetts dairy farmers, and plaintiff currently purchases milk from about 26 such producers. Thus, more than 90% of the "assessment" exacted by defendant from plaintiff will be distributed to dairy farmers

from whom plaintiff does ***not*** purchase any milk whatsoever.

27. Furthermore, and notwithstanding that the monthly payments exacted by defendant from plaintiff are *per se* invalid under the Commerce Clause (and upon other grounds set forth hereinafter), once the Commissioner has disbursed the funds, there is no practical way in which plaintiff can recover those funds from the recipients thereof.

28. Moreover, unless defendant is enjoined from disbursing said funds and/or required to maintain said funds, together with all interest thereon, in a separate account pending determination in this matter, defendant may sustain irreparable injury in that it will not be able as a practical matter to recoup the monies which thus have been exacted unlawfully from it.

29. Moreover, unlike most other licensees subject to the Pricing Order, the majority of the bottled milk processed by plaintiff for sale in Massachusetts is sold to consumers through Cumberland Farm's vertically-integrated dairy convenience stores. To the extent that plaintiff's stores thus compete for consumer milk sales with entities which obtain their raw milk supply from Massachusetts dairy farmers, defendant's unlawful exaction of the "assessment" with respect to out-of-state milk: (a) deprives plaintiff of the competitive advantage which its stores would otherwise enjoy; and/or (b) deprives plaintiff of the opportunity of passing along those lower raw milk procurement costs to its retail customers. By reason thereof plaintiff is sustaining, and will continue to sustain, loss, injury and damages to its business, sales and goodwill the amount of which is difficult (if not impossible) to measure.

30. For all of the foregoing reasons, plaintiff's remedy at law is inadequate.

**IRREPARABLE INJURY—
MILK DEALER LICENSE REVOCATION/SUSPENSION**

31. Plaintiff repeats the allegations of paragraphs 1 through 30 of the Complaint as fully set forth herein.

32. Under Massachusetts law, all persons engaged in the business of purchasing milk from producers, and otherwise handling milk within the Commonwealth must hold a milk dealer's license, which licenses are issued by defendant annually. Plaintiff has held such license continuously for many, many decades.

33. For the reasons set forth hereinabove and below plaintiff likely will prevail on its claim that defendant's Pricing Order is in violation of the Commerce Clause, but plaintiff will sustain irreparable injury if it were to continue to make monthly payments to defendant Commissioner pursuant to his Pricing Order.

34. Based upon defendant's prior conduct, plaintiff fears that even if it were to deposit the disputed assessments in a separate account (or, alternatively, to deposit such funds with the Clerk of this Court), defendant Commissioner nevertheless will attempt to revoke or suspend plaintiff's milk dealer's license.

35. Unless defendant is enjoined from attempting to do so, plaintiff will sustain irreparable injury in its business and properties, in violation of its rights under federal law.

**FIRST CAUSE OF ACTION
(Violation of the Commerce Clause)**

36. Plaintiff hereby incorporates by reference all of the allegations set forth in paragraphs 1 through 35 herein.

37. The application of the Pricing Order to plaintiff, and the exaction of the payments thereunder constitute an unreasonable and impermissible burden upon and obstruction of interstate commerce insofar as plaintiff is required to make any payment whatsoever with respect to the sale of milk in Massachusetts that was produced in another State.

38. Application of the Pricing Order to plaintiff therefore violates the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3.

39. Plaintiff will be irreparably injured unless this Court enjoins defendant from enforcing the Pricing Order against it, and also enjoins defendant from attempting to suspend or revoke plaintiff's milk dealers license pending the Court's determination in this matter.

40. Plaintiff has no adequate remedy at law.

41. Plaintiff also is entitled to a refund of all payments heretofore exacted by defendant, together with interest and costs and to an order compelling defendant to recover any and all sums heretofore paid by him from said Fund to Massachusetts producers, or otherwise.

SECOND CAUSE OF ACTION
(Violation of the Civil Rights Act)

42. Plaintiff hereby incorporates by reference all allegations set forth in paragraphs 1 through 41 hereof as if fully set forth herein.

43. Application of the Pricing Order to plaintiff violates its rights, privileges and immunities under the United States Constitution.

44. Defendant, acting under color of state law, has deprived plaintiff of said rights under the Commerce Clause, and the Due Process and Equal Protection clauses of the United States Constitution, in violation of 42 U.S.C., Sec. 1983.

45. Plaintiff has been irreparably injured by the imposition and collection of said unlawful levy against it by defendant, and will continue to sustain irreparable harm unless this Court enjoins defendant from enforcing the Pricing Order against plaintiff.

THIRD CAUSE OF ACTION
(Violation of the Supremacy Clause)

46. Plaintiff repeats the allegations set forth in paragraphs 1 through 45 of this Complaint as if fully set forth herein.

47. As stated above, plaintiff's milk processing plants are "fully-regulated" handlers pursuant to the New England Federal Milk Marketing Order #1, and the New York-New Jersey Federal Milk Marketing Order #2, as promulgated by the United States Secretary of Agriculture pursuant to the provisions of the Agricultural Marketing Agreements Act of 1937, as amended, 7 U.S.C., Sec. 601 *et seq.* (hereinafter "AMAA").

48. The declared policy of Congress in enacting the AMAA, as stated therein, includes the express policy of protecting the "interest of the consumer by . . . authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish . . .". 7 U.S.C., Sec. 602(2)(b).

49. Furthermore, and with respect to Federal Milk Marketing Orders in particular, the AMAA expressly prohibits the Secretary from issuing an order which "prohibit[s] or in any manner limit[s], in the case of the products of milk, the marketing . . . of any milk or product thereof produced in any production area in the United States." 7 U.S.C., Section 608c(5)(G).

50. Application of the Pricing Order to plaintiff, a fully-regulated handler pursuant to express provisions of the fed-

eral milk marketing orders established by the Secretary of Agriculture, thus is in irreconcilable conflict with both of the above-cited provisions of the AMAA. First, the Pricing Order has for its purpose the maintenance of prices to Massachusetts dairy farmers "above the level which it is declared the policy of Congress to establish" in the AMAA, as manifested by the actions taken by the Secretary in promulgating the aforesaid milk marketing orders. Secondly, application of the Pricing Order to plaintiff *per se* limits the marketing in Massachusetts of milk produced in "other production areas of the United States," and thus is in direct conflict with Section 8c(5)(G) of the AMAA (7 U.S.C., Sec. 608c(5)(G).

51. The Pricing Order, as applied and enforced by defendant in his official capacity against plaintiff, stands as an obstruction to the full accomplishment of the Congressional purposes above stated, is in irreconcilable conflict therewith, and thus must give way to paramount federal law under the Supremacy Clause of the United States Constitution.

FOURTH CAUSE OF ACTION
(Violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment)

52. Plaintiff repeats the allegations set forth in paragraphs 1 through 51 of this Complaint as fully set forth herein.

53. The application of the provisions of the Pricing Order against plaintiff constitutes deliberate, willful and arbitrary discrimination against plaintiff, is not reasonably related to any lawful public purpose or state police power or taxing power.

54. Defendant's actions pursuant to said Pricing Order therefore constitute the deprivation, under color of state law, of rights guaranteed to plaintiff under the Equal Protection and Due Process clauses of the United States Constitution, as made applicable to the States by the Fourteenth Amendment, in violation of 42 U.S.C., Sec. 1983.

RELIEF REQUESTED

WHEREFORE, plaintiff prays for the entry of judgment in favor of plaintiff and against defendant for each of the following reliefs:

(1) A declaratory judgment that the Pricing Order as applied to plaintiff violates:

(a) the Commerce Clause of the United States Constitution;

(b) plaintiff's rights under the Due Process and Equal Protection clauses, made applicable to the States by the Fourteenth Amendment;

(c) the Supremacy Clause (U.S. Const., Art. V) and is thus unenforceable; and

(d) plaintiff's civil rights pursuant to 42 U.S.C., Sec. 1983.

(2) A preliminary and permanent injunction enjoining defendant, his employees, agents and attorneys, from attempting in any way to collect from plaintiff the so-called "equalization" assessments provided for in the Pricing Order; or from attempting to suspend or revoke plaintiff's milk dealers' licenses by reason of plaintiff's failure to pay any further assessments pending the determination of this Court;

(3) An order requiring defendant to refund all monies heretofore paid by plaintiff pursuant to the Pricing Order, together with interest and costs;

(4) An award of plaintiff's attorneys fees pursuant to 42 U.S.C., Sec. 1988; and

(5) Such other and further relief as may be just and proper in the circumstances.

Dated: November 20, 1992

CUMBERLAND FARMS, INC.
DEBTOR-IN-POSSESSION

By its attorney,

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Opinion and Judgment in Cumberland Farms, Inc. v. LaFaver, *et al.*

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CUMBERLAND FARMS, INC.

vs.

JOHN LAFAVER, *et al.*

CIVIL NO. 92-70-P-H

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Like many states, Maine has found it necessary to take steps to protect its dairy farmers as an embattled species. Usually when states attempt to do this they run afoul of the Interstate Commerce Clause because their legislation discriminates. *See, e.g., Marigold Foods, Inc. v. Redalen*, 809 F. Supp. 714 (D. Minn. 1992); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992); *Baldwin v. G.A. F. Seelig, Inc.*, 294 U.S. 511 (1935). Maine has attempted to avoid this pitfall by adopting a slightly different

approach from other states. It has applied an "excise tax"[1] uniformly to all packaged milk handled within Maine, regardless of its source. The tax is generated whenever the price of milk falls below a certain level. The proceeds of the tax then go into a special fund and are distributed largely to Maine dairy farmers. I conclude that, under current United States Court precedents, Maine's scheme passes constitutional muster because the tax is uniformly applied. Although Supreme Court precedents prohibit discriminatory taxes, they do not prevent a state from subsidizing a domestic industry. I conclude that that is what Maine has done here. Economists may consider this a distinction without a difference but, for historical and other reasons, the caselaw recognizes a difference.

FACTS

All parties have moved for summary judgment on the following facts. The Maine Dairy Stabilization Act (the "Act"), 36 M.R.S.A., Sect. 4541, was enacted in 1991, P.L. 1991, ch. 526, when the producer price of milk had dropped approximately 40 percent and the number of active dairy farms in Maine had fallen to 659—down from 1023 a decade earlir. Emergency Preamble to the Act, Shaw Aff., par. 5. The purpose of the Act was to help stabilize the Maine dairy industry during periods of price fluctuations. Preamble. It tried to do this by creating a stabilization fund to

[1]I previously ruled that although the Act refers to its impost as a tax, the levy constitutes a fee for purposes of the Anti-Injunction Statute, 28 U.S.C., Sect. 1341.

support Maine milk producers,[2] Sect. 4544(1), financed through an "excise tax" on the handling in Maine of packaged milk destined for sale within Maine and subject to minimum retail prices set by the Maine Milk Commission. Sect. 4543(1).

The tax must be paid by the first handler of packaged milk in the state. *Id.* In most cases that is the wholesale handler (commonly referred to as the dealer); if the milk is packaged out-of-state, then the retail handler in Maine pays the tax. *Id.* The amount of tax is indexed to the "basic price" of milk, Sect. 4543(2), defined as the minimum Class I price of milk as set by the Maine Milk Commission. Sect. 4542(1). The index price is $16 per hundredweight ("cwt"). When the basic price of milk drops below $16 cwt, the amount of the tax varies along a graduated scale from $.01 per quart (when the basic price is $15.50 to $15.99 cwt) to $.05 per quart (when the basic price is below $14 cwt). Sect. 4543(2). Thus, when the basic price falls, the amount of the tax rises. Since the revenues raised are largely distributed to Maine dairy farmers, the fee subsidizes Maine producers during periods of low producer prices.

Under the pricing scheme administered by the Maine Milk Commission, *see* 7 M.R.S.A. ch. 603, the amount of the excise tax is added, not to the minimum price paid to producers by dealers, but to the minimum wholesale price paid to dealers by retailers. Sect. 2954(2)(B). The minimum retail price, in turn, is fixed in reference to the minimum wholesale price. Sect. 2954(2)(C). Thus, the statutory mini-

[2]Ninety-four percent of the funds collected from the tax are distributed to Maine milk producers; four percent of the funds are earmarked for the Women, Infants and Children Special Supplemental Food Program of the Untied States Child Nutrition Act; and two percent of the funds are dedicated bo cover administrative costs of the tax. Sect. 4544(2).

mum price paid by consumers of milk in Maine reflects the full amount of the tax.[3]

Maine dairy farmers ship approximately one half of their production out of state as raw liquid milk to be processed and retailed outisde of Maine.[4] The other half, processed and ultimately sold to consumers in Maine, accounts for over 95% of all in-state retail sales of liquid milk. The plaintiff, Cumberland Farms, together with a few other processors, accounts for the rest of the in-state wholesale and retail sales, its milk being primarily produced and wholly processed out of state and shipped to Maine in packages for sale to consumers.

Cumberland Farms is an "integrated operation," 7 M.R.S.A., Sect. 2951(4-A), in that it purchases raw milk from producers, processes the milk at its own facilities, packages the milk, ships the packaged milk to its own retail stores, and sells the milk directly to consumers. Within the Maine milk industry, Cumberland Farms is unique in this regard. Cumberland Farms is also unique for its retail sale in Maine of milk produced and processed outside the state. This gives Cumberland Farms a potential competitive advantage over in-state retailers of Maine milk, because the minimum producer price of milk produced in southern New

[3]For example, the minimum wholesale price set by the Maine Milk Commission in Order #93-03, effective Feb. 28, 1993, was $1.78 per gallon. The excise tax per gallon amounted to $.16. The retail margin was set at $.20. Adding these sums together, the minimum retail price totalled $2.14 per gallon.

[4]This milk is not subject to the tax because it never becomes subject to minimum retail prices set by the Maine Milk Commission. Sect. 4543(1).

England is less ~~than the~~ minimum price paid to producers in the state.[5]

[5]This advantage results from the overlap of federal and state regulation. In general, the federal government establishes the minimum producer price of milk paid to dairy farmers in various geographical marketing areas known as "orders." *See* 7 U.S.C. Sect. 608c. For instance, most of New England is encompassed within what is known as the New England Marketing Area, and the producer price of milk in that area is governed by Federal Milk Order No. 1. The state of Maine, however, is not included in any federal marketing area, and is not governed by federal milk orders. Nevertheless, milk produced in Maine and shipped into federal marketing areas for sale is subject to federal minimum producer prices. Similarly, federal minimum producer prices apply to milk originally sold for processing in a federally-regulated market area and subsequently shipped to Maine for retail sale. All of the milk sold by Cumberland Farms in Maine falls into this latter category.

As to milk produced, processed, and sold in Maine, the Maine Milk Commission sets minimum producer prices. 7 M.R.S.A. Sects. 2953-2954. In determining the minimum wholesale price to be paid to Maine dairy farmers, the Commission starts with the Federal Milk Order No. 1 price and adds an "over-order premium" reflecting various costs particular to Maine including the increased costs of production. Sect. 2954(2)(A). The Maine Milk Commission also sets the minimum dealer and retail prices for milk sold in Maine regardless of where it was produced and processed. The minimum wholesale price paid to dealers is calculated by adding a dealer margin and the amount of the handling tax to the minimum producer price. Sect. 2954(2)(B). The minimum retail price paid by consumers is calculated by adding a retail margin to the minimum wholesale price. Sect. 2954(2)(C). The result is that Cumberland Farm's minimum producer prices are regulated by federal order, and are thus lower than minimum producer prices in Maine (not considering any effects of local taxation or fees) even though Cumberland Farm's minimum retail milk prices are regulated by the Maine Milk Commission.

STANDING

As an initial matter, both the defendants and the intervenors[6] challenge Cumberland Farm's standing.[7] The nub of their argument is that since the burden of the dairy tax is passed on to consuemrs, Cumberland Farms has suffered no injury-in-fact and thus has no right to bring an action. *See Lujan v. Defenders of Wildlife*, 112 S. T. 2130, 2136 (1992). But Cumberland Farms is liable for the tax and must return payment to the state. This suffices to confer standing on Cumberland Farms. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984). I need not decide, therefor, whether current market conditions permit Cumberland Farms to pass the entire tax on to consumers.

COMMERCE CLAUSE

The Commerce Clause limits economic protectionism by restricting state-imposed regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 800 (1992). In order to determine whether Maine's law will withstand a Commerce Clause challenge, I must determine

[6]The intervenors, comprised principally of Maine dairy farmers, include Boston Milk Producers, Inc.; Agri-Mark, Inc.; Wayne Hapworth; Priscilla Rowbotham; Harold Larrabee; and Adrian Wadsworth.

[7]The defendants also request that I reconsider my decision not to dismiss the case pursuant to the Tax Injunction Act, 28 U.S.C. Sect. 1341. The defendants, however, fail to advance any new arguments regarding this issue, and their request to reconsider is **DENIED**.

whether it directly discriminates against interstate commerce, or indirectly affects interstate commerce and regulates evenhandedly.[8] *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). If the regulation fits the first category, it is unconstitutional; if it fits the second category, I must compare the burden on interstate commerce to the local benefits.[9] *Id.* If it fits neither category, it passes constitutional muster.

Cumberland Farms argues that the Maine statute places out-of-state producers at a competitive disadvantage in the Maine market, lessens price competition among dealers operating within the state, and insulates Maine farmers who supply milk for retail sale in Maine from the fluctuations of the regional and national markets. None of these conditions bears scrutiny.

The Act applies a uniform excise tax to all milk sold in Maine, regardless of its source. Thus, the Act does not affect handlers' economic decisions about where to pur-

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[8]Since the challenged impost is levied on products that move in interstate commerce, I assume that the Act has some effect on interstate commerce.

[9]I do not expressly follow the four part analysis for a tax on interstate commerce described in *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), because of my ruling that the impost is a regulatory fee rather than a tax for purposes of the Tax Injunction Act. But the result would be the same under that approach. *See Opinion of the Justices*, 601 A.2d 610, 617-19 (Me. 1991). Under the *Maryland* approach, a state's right to tax interstate commerce is limited, "and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State." *Id.* at 754. Construing the impost levied by the Dairy Act as a tax, rather than a fee, I find that the first, second, and fourth parts of the four-part *Maryland* test are easily satisfied. *See* 601 A.2d at 617. The remaining part of this analysis is common to the inquiry I pursue here.

chase raw producer milk. The resulting subsidy paid to Maine producers may provide them with an advantage or insulate them from regional price fluctuations, but the United States Supreme Court has held that to be permissible: "The Commerce Clause does not prohibit all state action of that description with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis omitted). Similarly, the Act does not lessen price competition because the fee is levied evenhandedly on all dealers in the state. There are no exemptions for milk that is intended for sale in Maine. To the extent that the higher minimum retail price is actually translated into higher prices for consumers, all deales and retailers are similarly affected.

Cumberland Farms also asserts that the Act exempts all Maine milk shipped in bulk out of state for sale elsewhere, thus improperly preventing the subsidy to Maine dairy farmers from hurting their competitive position in the interstate market. According to Cumberland Farms, this discriminates economically against milk produced outside the state and thus violates the Commerce Clause.

Maine, however, is entitled to enact laws "that have the purpose and effect of encouraging domestic industry." *Bacchus Imports, Ltd.*, 468 U.S. at 271. What Maine may not do is burden foreign producers by attempting to tax them or indirectly subject them to Maine's pricing scheme. This is where other states' law have gone astray. For instance, the New York regulation invalidated in *Baldwin* attempted to regulate the price paid to producers of milk outside the state by requiring that the producer price conform to New York's prices. *Id.* at 521-522. The regulation struck down in *Mar-*

igold Foods, Inc. indirectly required Minnesota dairy processors to pay Minnesota's minimum price even on milk purchased from out-of-state producers, thereby negating the economic advantage that foreign dairy farmers with lower prices had over Minnesota dairy farmers. *Id.* at 722. The regulation struck down in *McGuire* had precisely the same effect on producers of milk outside of New York. *Id.* at 1251-53.

The Maine Dairy Farm Stabilization Act works differently. The Act imposes a uniform regulatory fee at the wholesale or retail level on all handlers of packaged milk in Maine. The impost is not based on the differential between in-state and out-of-state minimum producer prices. The Act neither equalizes the price paid to foreign or in-state producers nor creates any difference between the minimum dealer or retail price of Maine or foreign mik. Thus, the Act does not prevent foreign producers who sell their milk for less to Cumberland Farms from enjoying a price advantage over Maine dairy farmers. Furthermore, the Act leaves intact Cumberland Farm's advantage in selling milk on the Maine market that it has purchased at a lesser cost from out-of-state producers. Interstate commerce is not unfairly burdened by the exemption for milk produced in Maine but sold out-of-state. It is true that the proceeds are then used to benefit Maine milk producers, but current precedents permit this kind of economic protectionism.

Finally, Cumberland Farms argues that it is required to pay from its profit a subsidy to Maine dairy producers from whom it does not purchase milk. But under the Act the potential profits of all Maine milk retailers are similarly infringed by the impost. As was true of the nondiscriminatory use tax upheld in *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937), "[e]quality is the theme that runs through all the sections of the statute." *Id.* at 583. The

"stranger from afar" is subject to no greater burden as a consequence of the fee than the "dweller within the gates." *Id.* at 584.

As a result, I conclude that the levy imposed by the Act does not directly or indirectly affect interstate commerce and that it, along with the subsidy of Maine producers, does not violate the Commerce Clause.

SUPREMACY CLAUSE

Cumberland Farms argues that the Act is contrary to federal milk regulation because imposition of the fee effectively raises the federal minimum price it pays to producers outside of Maine for milk eventually sold on the Maine market. I have already found, however, that the Act does not have the effect of raising mik prices outside of Maine. It therefore does not conflict with federal law.

DUE PROCESS CLAUSE

Cumberland Farms maintains that the Act violates the substantive requirements of the Due Process Clause because it is arbitrary and unrelated to the legislative objectives that led to its enactment. It takes an extraordinarily bad piece of legislation to run afoul of this requirement in the area of economic regulation, *see Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955), and this Act comes nowhere near the line.

Cumberland Farms also contends that the Act violates the procedural requirements of the Due Process Clause because it establishes minimum prices without the hearings required by legislation governing operation of the Maine Milk Commission. Conflicts between two statues, however, raise

questions of statutory interpretation, not a constitutional violation. There is no procedural due process violation.

CONCLUSION

Accordingly, for all the foregoing reasons, the plaintiff's motion for summary judgment is **DENIED**. The defendants' and intervenors' motions for summary judgment on the merits are **GRANTED**.[10]

SO ORDERED.

Dated at Portland, Maine this 3rd day of August, 1993.

S/D. Brock Hornby
United States District Judge

JUDGMENT

In accordance with the Order on Motions for Summary Judgment issued August 3, 1993 (Hornby, J.), judgment is hereby entered for the defendants and intervenors and against the plaintiff.

S/Kimberly A. Diamond
Deputy Clerk

Dated at Portland, Maine, this 4th day of August, 1993.

[10]Cumberland Farm's motion to strike the affidavit of Wellington is **GRANTED**. The intervenor's motions for oral argument and to submit a supplemental memorandum are **DENIED**.

FEDERAL ORDER #1 STATISTICS.* (ANNUAL 1977-1992)

TABLE I

Year	# of Producers	# of Producers in Maine	Daily Avg. Production Per Farm	Producer Receipts (million lbs.)
1977	8,030	602	1,703	4,993
1978	7,769	597	1,779	5,046
1979	7,497	580	1,860	5,089
1980	7,352	585	1,945	5,221
1981	7,042	596	1,981	5,093
1982	**6,923**	**593**	**2,079**	**5,253**
1983	6,836	604	2,197	5,483
1984	6,668	606	2,158	5,252
1985	6,350	534	2,330	5,399
1986	5,891	471	2,484	5,341
1987	5,412	402	2,619	5,173
1988	5,182	378	2,698	5,118
1989	4,931	341	2,764	4,975
1990	4,893	324	2,864	5,114
1991	4,829	339	3,012	5,309
1992	**4,686**	**325**	**3,194**	**5,478**

*Source: "Statistics—1977-1988," and Annual Reports for the years 1989 to 1992, as published by the Federal Market Administrator for the New England Milk Marketing Order.

TABLE II

CLASS I AND BLEND PRICES (ZONE 21)[1]

	M/W (at 3.5 bf)	Class I	Blended Price
1977	$ 8.58	$ 11.06	$ 10.01
1978	9.57	11.86	10.86
1979	10.91	13.19	12.18
1980	11.88	14.09	13.06
1981	12.57	15.00	13.90
1982	**12.49**	**14.76**	**13.61**
1983	12.49	14.82	13.59
1984	12.29	14.52	13.38
1985	11.48	14.00	12.67
1986	11.30	13.62	12.43
1987	11.23	13.86	12.56
1988	11.03	13.38	12.22
1989	12.37	14.46	13.45
1990	12.21	15.49	13.95
1991	11.06	13.23	12.07
1992	**11.88**	**14.51**	**13.08**

[1]For plants in zones nearer than Zone 21, the Class I and blended prices are higher by varying amounts up to 72 cents at plants in Zone 1. Conversely, the blended price and Class I price are lower by varying amounts at plants located in zones more distant than Zone 21.

TABLE III

MONTHLY M-W PRICES 1989-1991
(at 3/5% bf)

Month	1989	1990	1991
January	$11.90	$13.94	$10.16
February	11.26	12.22	10.04
March	10.28	12.02	10.02
April	11.09	12.32	10.04
May	11.12	12.78	10.23
June	11.33	13.78	10.58
July	11.76	13.43	10.99
August	12.39	13.09	11.50
September	13.10	12.50	12.02
October	13.87	10.48	12.50
November	14.69	10.25	12.48
December	14.93	10.19	12.10
Average	$12.37	$12.21	$11.06

99th Congress
1st Session

Ordered to be printed
September 13, 1985

HOUSE REPORT 99-271, PART 1

Committee on Agriculture

to accompany

H.R. 2100

(EXCERPTS)

* * *

[1] BRIEF EXPLANATION

The major provisions of the Food Security Act of 1985 are briefly described below.

* * *

[2] The Dairy Unity Act of 1985—

(1) For the fiscal years 1986 through 1990—

(A) establishes price supports for milk under a formula that ties the support level to changes in the real cost of producing milk and adjusts the initial support level for each year to reflect changes in commercial demand for milk;

(B) authorizes the Secretary of Agriculture to adopt a milk supply-reduction program if projected surpluses ex-

ceed trigger levels, and requires him to do so if the projected surpluses exceed a higher trigger;

(C) provides for payments to dairy farmers who agree to reduce their production under the program;

(D) requires a reduction in the price of milk when a diversion program is in effect to cover costs of the program that exceed the costs to the Government of 5 billion pounds of milk; and

(E) directs the Secretary, when a milk diversion program is in effect, to purchase and distribute an additional 200 million pounds of red meat annually.

(2) Directs the Secretary to study whether case in imports interfere with the milk price support program.

(3) Creates a National Dairy Research Endowment Institute to be funded by revenues raised from milk producers and dairy product importers.

(4) Requires the Secretary to increase differentials in a number of specified milk marketing orders.

(5) Establishes a National Commission on Dairy Policy to study and make recommendations on the operation of the Federal milk price support program.

(6) Extends for five years (A) authority to transfer dairy products to the military and veterans hospitals, and (B) the dairy indemnity program.

* * *

[14] Title II—Dairy

GENERAL

H.R. 2100 is legislation designed to reduce surplus milk production and the cost of the dairy price support program. For the current fiscal year, price support purchases are estimated by the Department of Agriculture to exceed 11 billion pounds, milk equivalent, at a cost of $1.7 billion annually.

H.R. 2100 will establish a new methodology of determining a milk support price by relating the costs dairy farmers face today with those in a three year base period, 1976-1978. This base period represents a time period during which milk supply and demand was fairly balanced. An index of "dairy-specific" input costs assigns a weight of 80 percent to certain production expenses of dairy farmers, 10 percent to the Consumer Price Index, and 10 percent to the opportunity cost of producing milk rather than selling cows for meat. The price support methodology under the bill changes also include: (1) an adjustment of the index of input costs to reflect changes in the real cost of producing milk as milk production per cow increases; (2) a pricing mechanism designed to relate the support [15] price to Government purchases thus making the support price more effectively responsive to demand; (3) a producer funded incentive program to encourage dairy farmers to reduce milk production on a partial diversion basis or whole-herd reduction basis; and (4) adjustments in the Class I differentials to more accurately reflect the cost of supplying and servicing these markets.

BACKGROUND

The dairy price support program puts a floor under the price of manufacturing grade milk through the purchase of dairy products (butter, cheese, and nonfat dry milk) by the Commodity Credit Corporation (CCC) at announced prices.

The dairy price support program does not set milk prices directly. The farm is supported through CCC's purchase of manufactured dairy products at prices set to enable handlers to pay farmers an amount, on the average, no less than the support price. The price actually paid to farmers for manufacturing grade milk is determined in the open market and is free to move above the support level, in response to supply and demand. Manufacturing grade milk prices are collected and reported by USDA as the Minnesota-Wisconsin (M-W) price series.

By undergirding all milk prices, the dairy price support program affects all producers of milk in the United States. In addition, about 80 percent of all milk is regulated by one of the 44 Federal milk marketing orders whose classified prices are influenced by M-W. Each order includes provisions for classifying and pricing milk according to use, with milk used for fluid products (Class I) being the use. Class I prices vary from order to order depending on the distance from the Minnesota-Wisconsin region, but all are based upon the Minnesota-Wisconsin series price. Consequently, all producers benefit from the price support program even though little or none of their milk produced may be purchased by the CCC.

* * *

[19] There is still a critical need to reduce milk production due to growing surpluses, and the increasing need to reduce and

control the budget deficit. Each month, since the end of the diversion, milk production has increased 3 to 8 percent from the previous year levels. In fact, milk production now exceeds commercial demand by more than 10 percent.

* * *

NEED FOR THE LEGISLATION

Because the diversion program was a new dairy policy concept, the subcommittee on Livestock, Dairy, and Poultry held hearings to determine the impact of the milk diversion program on the dairy and red meat industries. These hearings, as well as field hearings throughout the Nation indicated support for (1) the continuation of the present dairy price support program (2) the establishment of a new dairy pricing index to replace the parity concept; (3) the inclusion of a pricing mechanism to link the support price to prevailing supply and demand conditions; (4) the authorization of standby authority for a producer-funded diversion and whole-herd removal program; and (5) adjustments in Class I fluid milk differentials in existing federal milk marketing order.

Milk Price Support

* * *

[20] *Supply-demand pricing mechanism*

The use of a pricing mechanism is included in the bill, due to the fact that the previous parity formula has shown that a dairy index as a basic mover of milk prices cannot always accurately reflect the myriad of factors which influ-

ence the supply and demand for milk. Due to the fact that no index can fully respond to the many factors that affect the demand for milk, the Committee has included a supply-demand pricing mechanism in order to allow additional adjustments of the price support. This "sliding scale" is designed to relate the support to commercial demand and can be used to reduce the formula price when CCC purchases are projected to exceed five billion pounds, milk equivalent, and to increase it if CCC purchases are projected below three billion pounds, milk equivalent.

Diversion program

Since 1979, milk supplies have exceeded commercial consumption and government purchases have been excessive. Congress has addressed this problem through several legislative actions in the last five years. Most of these efforts have focused on freezing or reducing the support price in an attempt to discourage overproduction.

These policy changes have met with little, if any, success. Only the 15-month milk diversion, enacted by Congress in December 1983, has been successful in reducing surplus milk production and cutting the cost of the purchase program. During the diversion program, over $1 billion in federal budgetary outlay savings were achieved. The program was almost entirely funded by dairy farmers through an assessment of 50 cents per hundredweight on all milk commercially marketed.

The Committee believes that producer-funded diversion program is a more effective and equitable way to reduce excess milk production. Consequently, the committee has approved authority for a standby diversion program for use when substantial adjustment in milk supplies is necessary. The Secretary will be empowered to implement a diversion

program when Government purchases at the prevailing support price are projected to be between five and seven billion pounds, milk equivalent. In the event that removals [21] are projected to be in excess of seven billion pounds, the Secretary will be required to implement such a program, with producers sharing the program's cost in both instances.

To assure a more permanent reduction in milk production, the Committee has expanded upon the provisions of the previous diversion program and lengthened it to two years. In addition to being able to contract with USDA for reductions of five to thirty percent of an individual producer's base, farmers will be able to contract to terminate milk production by selling all their dairy cows for slaughter or export. Under this feature of the program, contracting farmers would submit a bid for the amount per hundredweight of milk that they would accept in exchange for agreeing to terminate milk production and to refrain from producing milk for a period of not less than three years. Additionally, the facility being used by the producer for milk production would be idled for at least three years.

The Committee believes that this program will achieve the desired reduction in the Nation's milk production in a manner which is equitable to dairy farmers and which will ensure that such reduction is permanent.

* * *

[22] *Federal Milk Marketing Orders*

The federal milk marketing order program is authorized by the Agriculture Marketing Agreement Act of 1937, as amended. Federal orders are part of a broad program of marketing arrangements and whereby the Secretary of Agriculture is authorized to stabilize market conditions by issu-

ing regulations which apply to handlers of milk and its products. The program is designed to achieve this orderly marketing by establishing terms and conditions which all affected milk processors must follow in dealing with producers. In 1984, over two-thirds of all milk sold to plants and dealers, and over 80 percent of the fluid grade deliveries in the United States were regulated by federal milk marketing orders.

Orders establish minimum prices which must be paid by handlers to farmers for milk used in various ways. The current minimum order prices for milk used in fluid form are, however, in many cases inadequate to cover the cost of supplying the fluid market. This has resulted in payments by handlers greater than the minimum order price in order to assure an adequate supply of milk for the fluid market. The variability of "over-order charges" has caused instability that the federal milk order program was designed to alleviate.

The last major changes made by the Department of Agriculture to Class I price differentials were in the late 1960's. Since costs, including transportation, assembly, and handling, have increased substantially during that time, the Committee feels it is necessary to adjust the fluid milk differentials in 35 of the 44 federal milk orders so that the prevailing minimum order prices will better cover the cost of supplying these markets. This action will reduce the need for over-order payments and providing equity among handlers supplying the market.

* * *

[23] The proposed changes in the marketing order minimums will more fully address the cost of transferring milk from the surplus areas to the deficit areas which in turn will assist

in providing a more uniform price to handlers or uniform payments to producers. At the moment, there are three major problems with respect to the operation of the Federal order systems: (1) minimum Federal order class I prices are not adequate to attract the necessary supply to meet the Class I needs in deficit area; (2) handlers who must go outside their territory to acquire additional milk incur greater [24] costs for milk than handlers who obtain all of their milk from the local area; and (3) those producers who assume the responsibility of supplying the needs of the market have to pay the cost of transporting supplemental milk, resulting in producers not receiving uniform prices.

There have been expressed concerns that implementation of minimum Class I prices would set a precedent in regard to management of Orders. The Secretary has not made permanent adjustments since the late 1960's. The Act does not suggest that milk be locally produced nor that it come from any specific area. It only requires that milk be attracted to those locations where it is needed for fluid use. The manner in which to attract milk is through adjusted prices. In deficit areas, that means the price must be high enough to cause it to be moved from where it is being produced to where it is needed. Class I differentials under the orders are not high enough to do this under todays' cost of transportation. It now costs about 3.4 cents per hundredweight per ten miles to move milk; however, when the Class I differentials under Federal orders were established, it was at a rate of about 1.5 cents per hundredweight per ten miles. Despite this dramatic increase in transportation costs, the minimum prices have not been permanently increased.